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No. 01-1830

IN THE

Supreme Court of the United States

DETROIT NEWSPAPER AGENCY,
Petitioner,

v.

DETROIT TYPOGRAPHICAL UNION, LOCAL 18,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Introduction

This case involves the arbitrability of a dispute regarding a vested benefit—a lifetime job guarantee—after the expiration of a collective bargaining agreement. There is nothing extraordinary about the Sixth Circuit's application of Supreme Court and Circuit Court precedent to the facts of this case. The Sixth Circuit, following the Supreme Court's teachings in *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991), concluded that post-contract disputes regarding lifetime vested job guarantees are arbitrable. The Sixth Circuit's ruling followed prior rulings of the Fourth

Circuit Court of Appeals and the Seventh Circuit Court of Appeals in similar cases. The only thing extraordinary about this case is the Detroit Newspaper Agency's determination to go to any length to defeat labor arbitration.

B. The Decisions Of The District Court And The Sixth Circuit Are Correct.

In 1974, DTU 18 and the predecessors to the Detroit Newspaper Agency (DNA) entered into identical Memoranda of Agreement (MOA) which provided that named individuals had lifetime job guarantees. Gary Rusnell is one of the named job guarantee holders. The MOA states:

> This guarantee shall be interrupted for the following reasons, for the duration of the incident, and restored at its conclusion:
>
> (1) Strike or lockout.
>
> (2) Disability of the guarantee holder.
>
> (3) Suspension of work opportunities through an Act of God which prevents composing room employees from working.
>
> (4) Leave of absence of the priority holder.
>
> (5) Time off for Union business.
>
> (6) Service in the armed forces.
>
> This guarantee shall be terminated for the following causes:
>
> (1) Resignation of the guarantee holder.
>
> (2) Death of the guarantee holder.
>
> (3) Just cause separation of the guarantee holder, unless restored to his position through the appeal provision of the labor contract.

(4) Attainment of sixty-fifth (65th) birthday by the guarantee holder.

(5) Permanent suspension of publication. (App. 138a-139a)

The MOA also includes a section titled "MEMORANDUM TO SUPERSEDE AND EXTEND BEYOND LABOR AGREEMENT" which provides that the provision of the MOA "shall be ongoing and part of all future collective bargaining agreements and shall not be subject to amendment except by mutual consent of the parties." (App. 150a)

On April 30, 1995, the 1992-1995 Collective Bargaining Agreement (CBA) between DTU 18 and the DNA expired. On July 13, 1995, DTU 18 and five other unions struck the DNA. In mid-February of 1997, DTU 18 and the other unions unconditionally offered to return to work. The DNA immediately reinstated most DTU 18 members who had lifetime job guarantees; but the DNA refused to reinstate some job guarantee holders, including Rusnell, because they had been "discharged" for "just cause" during the strike. (APX 222) DTU 18 filed a grievance on behalf of the terminated job guarantee holders. The DNA refused to arbitrate the grievance because, "[a]s these discharges occurred after the contract expired, arbitration would not appear to be available." (APX 116) DTU 18 sued to compel arbitration.[1]

The DNA's petition states that the district court refused to rule on the issue of arbitrability and "ordered the parties to

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[1] The DNA's statement, without record authority, that the other DTU 18 members who were "discharged strikers [with job guarantees] decided to retire in lieu of pursuing their respective grievances," is misleading. (Petition, p. 8, n. 7) In fact, the other DTU 18 strikers with job guarantees who were terminated for alleged strike misconduct received substantial "job guarantee buyout payments and severance benefits" in resolution of their grievances.

submit the issue of whether the grievances were arbitrable to the arbitrator." (Petition, p. 6) That is not true. The district court held that it was not necessary to rule on the DNA's interpretation of the "interruption" language of the job guarantee agreement in order to decide substantive arbitrability. Since the job guarantees were vested and a part of an "ongoing" MOA, disputes regarding the termination of job guarantees were arbitrable under the expired CBA. Arbitration, not the court, was the proper "forum" to consider evidence about the interpretation of the MOA provisions that the job guarantees are "interrupted for the duration of a strike or lockout," "restored at its conclusion" and may be "terminated" for "just cause separation of the guarantee holder unless restored to his position through the appeal provision of the labor contract." (App. 27a-28a) [2]

The Sixth Circuit noted that the district court expressly *had* decided the issue of substantive arbitrability, and the Sixth Circuit summarized applicable Supreme Court and Circuit Court precedent.

> The DNA contends that the district court erred by "refus[ing] to resolve . . . whether there was a right to

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[2] The DNA's description of the outcome of a consolidated lawsuit involving job guaranteeholders in one of the other striking unions, GCIU Local 13N, is misleading. The DNA states that, "The DNA and GCIU resolved Case No. 97-CV-74553 during the course of litigation before the district court. GCIU was a party to the district court's March 3, 1998 order, but not its later February 8, 1999 order concerning arbitrability." (Petition, p. 6, n. 4) In fact, following the district court's March 3, 1998 order compelling arbitration, the DNA and GCIU arbitrated two cases involving the discharge of job guarantee holders for alleged misconduct during the strike. The arbitration decisions in both cases were part of the record in the Rusnell case before Arbitrator McCormick. As Arbitrator McCormick noted, in both GCIU cases, the arbitrator rejected the DNA's argument that the grievant's job guarantee was not protected by just cause because the grievant was discharged during a strike when the job guarantee was interrupted. (App. 165a-166a)

arbitrate the propriety of discharges that occurred during the strike." No. 00-1613 Br. 24. Actually, the district court explicitly determined that the dispute was "covered" by the arbitration agreement and thus compelled arbitration. No. 00-1613 App. at 510. The district court thus fulfilled its obligations under *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 651 (1986) ("It is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances. . . .").

Federal labor policy strongly favors arbitration, and "[a]n order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Johnston Boiler Co. v. Local Lodge No. 893, International Brotherhood of Boilermakers*, 753 F.2d 40, 43 (6th Cir. 1985) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)). The district court compelled arbitration because it could not say "with positive assurance" that the dispute was not subject to arbitration. This finding, as the district court noted, would not be inconsistent with an arbitrator subsequently deciding that under the "merits and the specific facts of the particular grievance, it is not subject to arbitration." (App. 10a)

* * *

As the Fourth Circuit has pointed out, arbitration makes particular sense in the context of lifetime employment guarantees. As that court explained:

> [L]ifetime job guarantees . . . owe their existence to the recognition, both by the relevant unions and the employers in the printing industry, that technological advances in that industry are gradually bringing about

> the demise of the bargaining unit and its bargaining power. Knowing that they would eventually lose the economic ability to enforce contract demands, the unions in negotiating these provisions traded opposition to management's availing itself of new technology for a guarantee of job security with an implicit covenant of good faith to provide an hourly wage that will be reasonable under all pertinent circumstances.

Cumberland Typographical Union No. 244 v. The Times Alleganian Co., 943 F.2d 401, 406-407 (4th Cir. 1991) (citation omitted) (App. 11a-12a)

* * *

In *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991), the Supreme Court ruled that the right to arbitrate vested benefits survives the expiration of particular collective bargaining agreements: "[I]f a collective bargaining agreement provides in explicit terms that certain benefits continue after the agreement's expiration, disputes as to such continuing benefits may be found to arise under the agreement, and so become subject to the contract's arbitration provisions." *Id.* at 207-208. Section 11 of the MOA between the Union and DNA clearly provides that the MOA's provisions would remain "ongoing" even after the expiration of a particular collective bargaining agreement. The guarantees become part of future CBAs. Moreover, the 1992-1995 CBA stated explicitly in its incorporation of the guarantee that the guarantee would survive the expiration of the agreement. The Lifetime Guarantee MOA itself specifies that challenges to whether a separation was based on "just cause" would be resolved "through the appeals provision of the labor contract," which, in the case of the 1992-1995 CBA, was arbitration. Clearly, under *Litton*, the guarantee is a

benefit which continues after the agreement's expiration. "[I]f a dispute arises under the contract here in question, it is subject to arbitration even in the postcontract period." *Litton*, 501 U.S. at 205.

In the case over wage cuts in the face of a virtually identical lifetime job guarantee (with the same succession clause), the Fourth Circuit compelled arbitration even after the expiration of the agreement. *See Cumberland Typographical*, 943 F.2d 401 (4th Cir. 1991). The court held that the lifetime guarantee "continue[d] after the expiration of the main collective bargaining agreement," *Id.* at 405, and thus provided a basis for ordering arbitration. The Seventh Circuit has reached a similar conclusion. *See Chicago Typographical Union No. 16 v. Chicago Newspaper Publishers Ass'n*, 853 F.2d 506, 510 (7th Cir. 1988). The DNA's efforts to distinguish the decisions from other circuits relied upon by the Union are unpersuasive. The DNA asserts that the right to a lifetime guarantee never existed for striking workers, and therefore that the right never "vested" so as to survive expiration. Since we hold that the lifetime guarantee could not be unilaterally terminated during a strike, we reject this argument. The right had fully vested, and therefore the dispute concerned interpretation of the 1992-1995 CBA in which the MOA was incorporated and thus should be resolved according to the arbitration provision of that agreement. (App. 12a-13a)

The DNA also mischaracterizes the decision of the Sixth Circuit when it argues that the Sixth Circuit substituted "its own misguided notions of what is 'fair'" for the job guarantee language of the MOA. (Petition, p. 21) That is not true. The Sixth Circuit did not weigh equities or hardships. The Sixth Circuit applied ordinary principles of contract interpretation

to conclude that Arbitrator McCormick's interpretation of the job guarantee agreement was "the only *fair reading* of the guarantee."

> [W]e think that the Union's interpretation of the agreement is not simply one to which the agreement is susceptible, but is actually the only *fair reading* of the guarantee. As the arbitrator pointed out, the guarantee includes a list of circumstances in which the guarantees are "interrupted" and a list in which they are "terminated." If an interruption permits the company to terminate guarantees without just cause, then the "termination" list is in some sense redundant. Since ordinary principles of contract interpretation call for interpreting an agreement so as to give meaning to every stated provision, interruption cannot provide the basis for termination. We think the parties intended "interruption" merely to provide a respite for the employer from paying wages and providing benefits to guarantee holders during one of the circumstances listed, in which the guarantee holder would be unable to contribute to the workplace in any real sense. The DNA has provided no authority for the proposition that the interruption of a guarantee permits an employer to terminate a guarantee holder without just cause or one of the other listed grounds for termination. Were we to accept the DNA's argument, it would mean that the employer could terminate the MOA as to employees on disability leave, in the armed services, absent on union business, or during periods in which newspaper production was suspended because of an Act of God. The unreasonableness of that conclusion is apparent. (Emphasis added.) (App. 10a-11a)

The above-quoted passages from the Sixth Circuit's opinion squarely rebut the arguments advanced by the DNA in support of its petition.

REASONS FOR DENYING THE WRIT

The DNA's argument that the Sixth Circuit's decision conflicts with the Supreme Court's decision in *Litton* is wrong. In *Litton*, the Supreme Court ruled that the right to arbitrate disputes regarding vested benefits survives the expiration of particular collective bargaining agreements. That is why the Sixth Circuit *followed Litton* when it affirmed the district court's ruling that the dispute regarding the "just cause" termination of Rusnell and several other individuals' with vested job guarantees was arbitrable under the expired CBA.

The DNA's argument that the Sixth Circuit's decision conflicts with a decision of the Seventh Circuit on the same issue also is wrong. The DNA points to *Independent Lift Truck Builders Union v. Hyster Co.*, 2 F.3d 233 (7th Cir. 1993) in order to manufacture a non-existent split between Circuits. However, there is no conflict between the Seventh Circuit's decision in *Hyster* and the Sixth Circuit's decision in this case. In *Hyster*, the Seventh Circuit found that the district court erred when it ruled that arbitration (not the court) was the proper forum to decide substantive arbitrability that *necessarily* involved deciding the merits. *Id.* at 236. In this case, the Sixth Circuit affirmed the district court ruling that it was *not necessary* to reach the merits of the DNA's discharge arguments in order to find that the dispute regarding vested job guarantees were arbitrable under the expired CBA. Indeed, the Sixth Circuit's holding in this case is the same as the Seventh Circuit's holding in a similar case involving a lifetime job guarantee agreement. *See Chicago Typograph-ical Union No. 16 v. Chicago Newspaper Publishers Ass'n*, 853 F.2d 506, 510 (7th Cir. 1988).

CONCLUSION

For the foregoing reasons, Respondent DTU 18 requests that the DNA's petition be denied.

Respectfully submitted,

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